SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 489

DAN DURLEY,

Petitioner,

vs.

NATHAN MAYO, CUSTODIAN, FLORIDA STATE PRISON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE PETITIONER

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Opinion Below

The Supreme Court of Florida did not file an opinion. Neither its Order Denying Petition for Writ of Habeas Corpus (R. 20) nor its Order Denying Petition for Rehearing (R. 29) has been officially reported.

Jurisdiction

Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28, United States Code, Section 1257(3). The final judgment of the Supreme Court of Flor-

ida denying petitioner's claim that he is imprisoned in violation of his rights and immunities under the Fourteenth Amendment to the Constitution of the United States was rendered February 22, 1955 (R. 20). A timely petition for rehearing was considered and denied on March 22, 1955 (R. 29). Petitioner's motion for leave to proceed *in forma pauperis* and his petition for writ of certiorari were filed with this Court on April 18, 1955, and were granted on October 24, 1955 (R. 46).

Constitutional Provisions and Statutes Involved

The Constitutional and statutory provisions involved are set forth in the Appendix hereto, pp. 34-38. Their official citations are as follows:

1. Section 1, Fourteenth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., pp. XLV-XLVI.

2. Fifth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLIV.

3. Eighth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLV.

4. Section 811.11, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953; 22 F. S. A. 811.11.

5. Section 811.12, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953; 22 F. S. A. 811.12.

6. Section 954.06, Chapter 954, Title XLVI, Volume II, pp. 2851-2852, The Official Florida Statutes 1953; 24 F. S. A. 954.06.

7. Section 79.10, Chapter 79, Title VI, Volume I, p. 334, The Official Florida Statutes 1953; 6 F. S. A. 79.10.

Each of the above-cited Florida Statutes was in effect on the date of petitioner's convictions and has not since been amended except that Section 954.06, F. S. '53, relating to gain time for good behavior of convicts, was twice amended in a way not affecting this controversy during the period between petitioner's convictions and the filing of his petition for writ of habeas corpus in this case. However, the statute is reproduced in the Appendix both as it was on the date of petitioner's convictions and on the date this action was instituted.

Questions Presented

I

Where the Florida Supreme Court has repeatedly ruled that it is always open to hear on petition for writ of habeas corpus the claims of persons who contend they have been convicted or sentenced in violation of their Constitutional rights, does the decision of the Florida Supreme Court in this case denying a petition for writ of habeas corpus, without requiring an answer or holding a hearing, involve a determination of Federal questions affording this Court jurisdiction to review the decision where the petition alleged facts supporting petitioner's claim that he is imprisoned in violation of his rights and immunities under the Fourteenth Amendment to the Constitution of the United States?

II

Does the imposition by a State of three separate sentences for a single offense, each sentence being for the maximum terms prescribed by statute and each to be served consecutively, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

III

Where an accused's conviction was obtained solely on the basis of perjured testimony of two co-defendants who corruptly agreed to implicate the accused, hoping to relieve themselves of the full onus of the crime, and where both co-defendants have admitted such perjury within a few months after the conviction, does a State's continued imprisonment of the accused on the basis of such a conviction violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

On February 10, 1955, petitioner filed a petition for writ of habeas corpus, together with eight attached exhibits, with the Supreme Court of Florida (R. 1-18). That Court set the petition down for preliminary hearing on February 21, 1955 (R. 19). At that hearing respondent was represented by counsel, but petitioner, being imprisoned by respondent and without funds to retain a lawyer (R. 29), could neither be present nor represented (R. 19, see petitioner's sworn motion to proceed *in forma pauperis* filed with this Court April 18, 1955). On February 22, 1955, the Court below denied the petition without affording petitioner a hearing and without requiring a response from respondent (R. 20). The expressly and only stated ground for the Court's order was that petitioner had failed to show probable cause to believe that he is detained in custody without lawful authority (R. 20). Thereafter, petitioner's timely motion for rehearing (R. 20) was considered and denied on March 22, 1955 (R. 29).

In these circumstances, the allegations of the petition must be taken as true for purposes of review by this Court. *Hawk v. Olson* (1945), 326 U.S. 271, 273; *White v. Ragen*

(1945), 324 U. S. 760, 763. These allegations are as follows:[1]

On or before July, 1945, two citizens of Polk County, Florida, R. B. Massey, Jr. and Charles Bath, associated together and determined to become cattle rustlers (R. 17, 16). These men had worked on different occasions as laborers for petitioner, who enjoyed a reputation for truthfulness and honesty in the community (R. 17). For this reason, both men thought it would go easier with them, should they unhappily be caught, if they falsely implicated petitioner as their employer in crime (R. 16, 17). They therefore agreed before launching their career as rustlers "that if they were caught stealing cows or with the meat, that they would tell the law that they were working for Dan Durley." (R. 17).

One of the two confederates, Massey, borrowed and used petitioner's truck on two occasions, saying he intended to use it for hauling wood (R. 16). Although not explicitly stated in Massey's affidavit, it can reasonably be inferred from that affidavit that Massey and Bath actually used the truck on those occasions for stealing cattle (R. 16-18).

In the due course of events Massey and Bath were caught stealing cattle, and true to their corrupt bargain, falsely implicated petitioner as their employer in crime (R. 24, 28).

On this basis, and without a Grand Jury investigation (R. 28), the County Solicitor for Polk County filed two informations charging petitioner, Massey, and Bath, with

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[1] Petitioner drew the petition himself while incarcerated without benefit of counsel. A reading of both this petition and the petition for certiorari discloses that petitioner must be a layman without a great deal of formal education. In these circumstances both this Court and the Supreme Court of Florida have held that they will not hold such a person to the standard of a skilled legal draftsman. *Rice* v. *Olson* (1945), 324 U.S. 786, 791-792; *Tomkins* v. *Missouri* (1945), 323 U.S. 485, 487; *Chase* v. *State* (1927), 93 Fla. 963, 113 So. 103, 106; *Ex Parte Amos* (1927), 93 Fla. 5, 112 So. 289, 291-292; See *Darr* v. *Burford* (1950), 339 U.S. 200, 203-204.

six offenses of stealing cattle, each information containing three separate counts purporting to charge an offense (R. 9-10). The three counts of one information (R. 9-10) charged: (1st Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away two steers belonging to a Mrs. Edna P. Bronson; (2nd Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away two cows belonging to Mrs. Edna P. Bronson; and (3rd Count) that the three defendants on July 7, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to Mrs. Edna P. Bronson.

The three counts of the other information (R. 10-11) charged: (1st Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one cow belonging to William C. Zipperer; (2nd Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to William C. Zipperer; and (3rd Count) that the three defendants on July 29, 1945, in Polk County, Florida, did steal and carry away one heifer belonging to William C. Zipperer.

It is to be noted that the second and third counts of this last information are virtually identical (R. 11).

At the trial held in the Criminal Court of Record for Polk County, petitioner asserted his innocence, but was found guilty by a jury (R. 12) solely on the testimony of the two co-defendants, Massey and Bath, both of whom admitted their guilt and implicated petitioner (R. 7, 6, 14). The evidence at the trial, including the testimony of Massey and Bath, showed clearly and without dispute that the five cattle (two steers, two cows, and one heifer) alleged to have been stolen from Mrs. Edna P. Bronson on July 7, 1945, were stolen by Massey and Bath at the same time, from the same place, under the same circumstances, and with the same intent (R. 3, 6, 14, 16-18, 21). Similarly, the State's evidence showed clearly and without dispute that the three

cattle (one cow and two heifers) alleged to have been stolen from William C. Zipperer on July 29, 1945, were stolen by Massey and Both at the same time, from the same place, under the same circumstances, and with the same intent (R. 4, 14, 22). The five cattle stolen on July 7, 1945, and the three cattle stolen on July 29, 1945, were in each case all on the same range, rounded up together, shot, skinned, butchered,[8] and dressed at the same time and place, and their remains hauled off together on the same truck to the same market and sold all together (R. 3, 4, 6, 14, 21, 22).

At the conclusion of the trial, Judge Amidon sentenced petitioner to five years imprisonment on each of the six counts contained in the two informations, each sentence to be served consecutively, hereby making a total sentence of thirty years' imprisonment (R. 12-14). Co-defendant R. B. Massey, Jr., was sentenced to twenty-six years' imprisonment (R. 17), and co-defendant Charles Bath received a sentence of two years' imprisonment (R. 17). At the time of sentencing, petitioner was 53 years old and had never before been accused of any dishonesty (R. 29).

Petitioner was sentenced October 19, 1945 (R. 13-14), and under the terms of Florida's "gain time" for good conduct statute, Section 954.06, F. S. '53, has now served time enough to more than discharge a 15 year sentence.

Within four months after the above-described proceedings, Charles Bath admitted to a fellow inmate in the State prison that he and Massey had falsely implicated petitioner in their crimes pursuant to their prior corrupt scheme, that he had testified falsely against petitioner at the trial, and that petitioner was innocent of the charges upon which he had been convicted (R. 17-19).

And within six months after those proceedings, the other co-defendant, Massey, executed an affidavit swearing that he had testified falsely against petitioner at the trial, that the crimes charged had been committed "solely by me and Charles Bath, without knowledge or consent of Dan

Durley or anyone for him" and that "Dan Durley is absolutely innocent." (R. 16).

After unsuccessfully seeking relief by petitions for writ of error *coram nobis* (R. 34), petitioner on May 9, 1949, filed a hand-written, self-drawn petition for writ of habeas corpus with the Supreme Court of Florida (R. 33). The only Federal claim or right asserted in this petition was that petitioner had been proceeded against by a bill of information contrary to the Fifth Amendment to the Constitution of the United States (R. 33-34). Elsewhere in this petition it is alleged that petitioner was convicted wholly on "prejudge (sic) and perjured testimony." (R. 33). The petition contained no allegation and did not present the contention that the petitioner had been improperly convicted and sentenced for six offenses, rather than for two (R. 33-37). This petition was denied summarily on the same day it was filed, without a hearing or requiring a response (R. 38).

Again on January 30, 1952, petitioner with the aid of court-appointed counsel filed a petition for writ of habeas corpus with Judge Murphree of the Circuit Court of Union County, Florida (R. 38). In this petition, drawn by a lawyer, it was asserted that the two informations upon which petitioner was convicted actually charged only two offenses, for each of which the maximum penalty was five years, and that petitioner had already served sufficient time to satisfy a ten year sentence (R. 38-40). The only Federal claim asserted was the vague, generalized contention that petitioner was imprisoned in "violation of his rights as set out in the Constitution of the United States." (R. 40).

Judge Murphree issued the writ on January 31, 1952, and respondent filed his return on February 7, 1952, denying that the larceny charged in any of the counts of the two informations was the same larceny as those charged in the other counts (R. 33), and denying a non-existant allegation *not* made in the petition, to-wit, that any two of

the six larcenies charged were committed under the same circumstances (R. 43, paragraph 2).

On that same day, February 7, 1952, Judge Murphree heard argument of counsel of both parties and thereupon quashed the writ and remanded petitioner to respondent's custody (R. 42). While it does not appear of record in this cause presently before this Court because respondent was not required to respond below and did not formally assert his prior proceeding as a bar by pleadings to which petitioner could have replied, petitioner is nevertheless prepared to show that Judge Murphree did not hold a hearing on the merits of petitioner's claims, or attempt to resolve the factual disputes between the parties, but rather was persuaded by the argument of respondent's counsel that the prior dismissal of petitioner's previous petition for writ of habeas corpus by the Florida Supreme Court on May 9, 1949, had settled petitioner's contentions adversely to him and barred their assertion in the Circuit Court (see pp. 1-2 of petitioner's brief in reply to respondent's brief in opposition to petition for certiorari filed with this Court September 6, 1955).

Petitioner's appeal from the order of Judge Murphree quashing the writ was dismissed by the Florida Supreme Court on April 1, 1952, on motion of respondent (R. 45).

Summary of Argument

I. The Florida Supreme Court in this case considered, ruled upon, and denied petitioner's claim of rights and immunities under the Due Process Clause of the 14th Amendment. In Florida the remedy of habeas corpus is available as of right to one claiming he is imprisoned in violation of his Federal or State Constitutional rights, and such proceedings may be originally instituted either in the various circuit courts or in the Florida Supreme Court. The inquiry in such cases may involve both ques-

tions of fact and law, and a petitioner is not limited to showing only defects which appear on the face of the record. The petition in this case was not barred by previous adverse rulings on prior petitions because the contentions here raised were not presented or determined in the prior proceedings, the defense of former adjudication was not pleaded as is required, and in any event such defense is a discretionary one which the Florida Supreme Court properly chose not to rely upon in this case as is shown by the very fact that the Court below considered the petition on its merits and based its ruling solely on the express ground that the petition did not state a cause of action, i.e., did not show probable cause to believe petitioner was detained without lawful authority.

II. Under the facts alleged in the petition, which must be taken as true on this review, petitioner was unlawfully convicted and punished three times for a single offense committed on July 7, 1945, and was also unlawfully convicted and punished three times for a single offense committed on July 29, 1945. The maximum prison sentence prescribed by statute for each offense charged was only five years, or a total of ten years for the two crimes, but petitioner was sentenced to a total of thirty years in prison. Such action by a State is in flagrant disregard and clearly offensive to those basic canons of decency and fairness which express the notions of Justice of English-speaking people and are implicit in the concept of ordered liberty. Such State action therefore violates the due process clause of the 14th Amendment. In addition, the right or immunity expressed in the 5th Amendment against double jeopardy and in the 8th Amendment against cruel and unusual punishments are rights and immunities which are so rooted in the traditions and conscience of our people as to be protected against State infringement by the Due Process Clause of the 14th Amend-

ment. Florida's action in this case plainly violates such rights and immunities.

III. On petitioner's undenied allegations, supported by the most persuasive and convincing evidence or showing that could possibly be made without a hearing, petitioner is innocent of the charges against him and was convicted solely on the basis of the perjured testimony of two frightened, depraved co-defendants, his former employees, pursuant to their deliberate, venal scheme falsely to implicate petitioner with their misdeeds in a calculated attempt to relieve themselves of the full responsibility and onus of their own independent actions. As a result, petitioner was sentenced at age 53 to 30 years in prison. Such injustice cries out for correction. It shocks the conscience of any man of heart and right feeling. Surely in this day and age our judicial processes are not so feeble and unenlightened as to provide no remedy for such an unfortunate person. Due Process of Law commands that a State provide one who makes a *prima facie* showing such as petitioner has in this case some fair opportunity to establish his innocence.

Argument

I. THE FLORIDA SUPREME COURT FULLY CONSIDERED, RULED UPON, AND DENIED PETITIONER'S CLAIMS THAT HE IS IMPRISONED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *The Petition for Writ of Habeas Corpus Properly Raised With The Required Precision Petitioner's Claim That He Is Imprisoned In Violation Of His Rights Under The Due Process Clause of The Fourteenth Amendment.*

While this Court has held that a mere reference to the "Constitution of the United States" or "due process

of law" may not be sufficient to raise a Federal question in a State Court (Herndon v. Georgia (1935), 295 U.S. 441, 442-3; *Bowe* v. *Scott* (1914), 233 U.S. 658, 664-5), the petition in this case does not suffer from such a defect. Here, petitioner specifically asserted that his imprisonment is in violation "of the Due Process Clause of the 14th Amendment to the Constitution of the United States of America." (R. 1). No greater precision than this could fairly be required.

B. *Under Florida Law Petitioner In This Case Properly Invoked The Remedy Of Habeas Corpus In The Proper Court.*

The Florida Constitution vests the State Supreme Court, each of the Justices thereof, the various Circuit Courts and the Judges thereof each with concurrent jurisdiction to issue writs of habeas corpus. Sections 5 and 11, Article V, Constitution of the State of Florida, Volume I, pp. 11-12, The Official Florida Statutes 1953. It is therefore plain and clear that the Court below had the power to entertain this case.

Moreover, there is no rule in Florida that a person should first apply to a lower court for the writ. See *ex parte Hawk* (1944), 321 U.S. 114, 116. This is shown by the large number of cases wherein the Florida Supreme Court has entertained an original proceeding for habeas corpus, and particularly by the recent case of *Shoemaker* v. *Mayo* (1954), Fla., 75 So. 2d 690. In the Shoemaker case, a prisoner filed his petition for habeas corpus originally with the Florida Supreme Court, claiming a denial of his constitutional rights in that he had been sentenced on a plea of guilty, which allegedly he had entered while under the influence of some narcotic drug previously administered to him. The Florida Su-

preme Court issued the writ, the respondent filed an answer denying the petitioner's factual allegations, and the Supreme Court thereupon appointed a commissioner to take testimony and report his findings. As it developed, petitioner's factual claims were utterly without foundation and the writ was quashed. In doing so, however, the Florida Supreme Court stated:

> "Though the court is always open to hear the claims of persons who contend that they have been convicted or sentenced in violation of constitutional rights, its jurisdiction is not to be trifled with or its processes abused by persons who invoke its jurisdiction through deliberate falsification or wilful misrepresentation of material facts." 75 So. 2d 690, 691.

It is obvious from this ruling and the Court's actions in the *Shoemaker* case that not only will the Florida Supreme Court entertain an original habeas corpus proceeding where a petitioner makes a substantial claim that he has been convicted or sentenced in violation of his constitutional rights, but that such a proceeding may involve alleged defects (as they did there) which are not apparent on the face of the record and which involve factual issues.

Similarly, by way of example, in the following cases the Florida Supreme Court has consistently entertained on the merits in original proceedings petitions for a writ of habeas corpus by prisoners challenging their detention on the ground their judgment of conviction or sentence was either invalid or unauthorized: *Ex Parte Browne* (1927), 93 Fla. 332, 111 So. 518 (Petitioner's sentence held invalid as violative of provision in Florida Constitution against *ex post facto* laws); *Ex parte Simmons*

(1917), 73 Fla. 998, 75 So. 542, 543 (prisoner's sentence for larceny held invalid "as a sentence in excess of the period for which the petitioner could lawfully be imprisoned on a single conviction for grand larceny."); *Hall* v. *Mayo* (1955), Fla., 83 So. 2d 845 (prisoner's petition for rehearing treated as new and second petition for habeas corpus and prisoner ordered discharged as his two sentences for cattle stealing ran concurrently rather than consecutively); *Sparkman* v. *State Prison Custodian* (1944), Fla., 18 So. 2d 772 (prisoner's sentence as a second offender held invalid as prisoner had not actually been previously convicted and prisoner, having served maximum sentence for a first offense, ordered discharged); *Collingsworth* v. *Mayo* (1955), Fla., 77 So. 2d 843 (prisoner's 20 year sentence imposed in 1948 held void as in excess of 15 year maximum penalty imposed by statute for offense charged and prisoner ordered remanded for proper sentence); *State* v. *Mayo* (1937), 128 Fla. 843, 175 So. 808 (error in sentence of prisoner as a second offender, not apparent on face of judgment or sentence, held to render part of judgment and sentence imposed for prisoner's being a second offender illegal and void; here the writ was granted by a Justice of the Supreme Court, but was made returnable before a Circuit Judge); *Ex parte Wilson* (1943), 153 Fla. 459, 14 So. 2d 846 (Judge improperly adjudged and sentenced prisoner for a crime not described in the statutes; prisoner ordered remanded for imposition of a proper judgment and sentence); *Allison* v. *Mayo* (1947), Fla., 29 So. 2d 750 (jury improperly convicted prisoner, of two offenses arising out of one transaction by rendering a general verdict of guilty on a two count information charging similar but inconsistent offenses; *held:* such error may be asserted by collateral attack in original habeas corpus proceedings, the only

valid judgment and sentence in such a case is on the lesser offense, and the prisoner, having served the maximum period for the lesser offense, is entitled to be discharged).

Other cases, initially arising in the circuit courts, have likewise held that the remedy of habeas corpus is available in a case such as this. Thus, in *Faison* v. *Vestal* (1916), 71 Fla. 562, 71 So. 759, the Supreme Court of Florida ruled that habeas corpus was a proper remedy for one claiming to be improperly punished twice for the same offense. Such a holding shows Florida is in accord as to the availability of habeas corpus to remedy improper double punishments with both the Federal rule and that in other jurisdictions. See *Bertsch* v. *Snook* (CA 5, 1929), 36 F. 2d 155; *Ex parte Rose* (DC Mo., 1940), 33 F. Supp. 941; *Sprague* v. *Aderholt* (DC Ga., 1930), 47 F. 2d 790; *Re Nichols* (1927), 82 Cal. App. 73, 255 P. 244.

Similarly, in *McDonald* v. *Smith* (1914), 68 Fla. 77, 66 So. 430, the Court below ruled that a judgment and sentence which had been affirmed on appeal "may be collaterally assailed in habeas corpus proceedings" as wholly unauthorized by law. As stated only recently by the Florida Supreme Court in *Collingsworth* v. *Mayo* (1955), Fla., 77 So. 2d 843, 844:

> "It is settled in this jurisdiction that where the sentence imposed on a criminal charge is in excess of that authorized by law, a defendant held in custody pursuant to such sentence is entitled, in a habeas corpus proceeding, to be remanded for a proper sentence."

Moreover, the remedy by habeas corpus in such cases is a matter of right, the writ under Florida law being a prerogative writ of right and not discretionary. *Ex parte Amos* (1927), 93 Fla. 5, 112 So. 289, 291.

Petitioner therefore respectfully submits that it is abundantly clear from the foregoing cases that he invoked in

this case the proper remedy in the proper forum, and that if petitioner in truth is being imprisoned in violation of his Federal Constitutional rights afforded by the Due Process Clause of the Fourteenth Amendment, under the facts and circumstances as alleged in this case, the remedy of habeas corpus is fully available to him under Florida law. Indeed it is a matter of considerable pride and credit to the State that few, if any, jurisdictions have accorded the Great Writ any broader scope or greater respect than Florida. Compare *White* v. *Ragen* (1945), 324 U. S. 760; *Pyle* v. *Kansas* (1942), 317 U. S. 213; *Cochrane* v. *Kansas* (1942), 316 U. S. 255; *Rice* v. *Olson* (1945), 324 U. S. 786.

C. *The Petition for Habeas Corpus Was Not Barred by Former Adjudications*

Respondent has contended in opposing the petition for writ of certiorari in this case that a remedy by way of habeas corpus in this case is barred by former adjudications. While at common law the doctrine of *res judicata* did not extend to a decision on habeas corpus refusing to discharge a prisoner, *Salinger* v. *Loisel* (1924), 265 U. S. 224, 230, this rule has been modified in Florida by statute. Section 79.10, F. X. '53, Appendix, P. 38. It is to be noted, however, that this statute does not apply the traditional doctrines of *res judicata* to habeas corpus proceedings with their full force and vigor. Thus, while an ordinary civil judgment is conclusive as between the parties not only as to all matters actually litigated, but those which might have been raised as well, Section 79.10, F. S. '53, provides only that a person remanded to custody as the result of a prior habeas corpus action shall not be at liberty "to obtain another habeas corpus *for the same cause*" or to relitigate "the same matter again." It is submitted, therefore, that this statute only bars the relitigation of questions and matters *actually* presented and decided. See *State* v. *Drum-*

right (1934), 116 Fla. 496, 156 So. 721, 723-24; *State ex rel. Williams* v. *Prescott* (1933), 110 Fla. 261, 148 So. 533.

With this in mind, petitioner vigorously contends that his petition for habeas corpus in this case was not barred by prior adverse rulings. While some of the reasons supporting petitioner's position may seem unduly technical, it should not be forgotten that the defense itself is a highly technical and drastic one and merits strict application so as not to expand it beyond its limits and work a harsh result.

1. The Federal Questions Here Raised Were Not and Could Not Have been Determined in the Prior Proceedings upon Which Respondent Relies

The two prior proceedings upon which respondent relies as barring this action are the petition for habeas corpus filed by petitioner with the Florida Supreme Court on May 9, 1949 (R. 33-37) and the petition for habeas corpus filed by petitioner's court-appointed counsel in the Circuit Court for Union County on January 30, 1952 (R. 38-41). Neither of these petitioners, however, raised the Federal questions here involved. Indeed, the May 9, 1949 application did not in any way raise the double punishment contention here asserted, and it would have been premature if it had since by that date petitioner had not yet served sufficient time to discharge an unchallenged ten years sentence. See *Finch* v. *Mayo* (1955), Fla., 79 So. 2d 770. Moreover, the previous denial of a premature petition for habeas corpus will not bar the granting a later petition which is not premature. See *Hall* v. *Mayo* (1955), Fla., 83 So. 2d 845.

It is true that the May, 9, 1949 petition did assert that petitioner was convicted on the sole basis of the perjured testimony of his co-defendants (R. 33-37), but no violation of Federal rights was claimed in connection therewith. The only Federal claim made was that petitioner had been proceeded against by information rather than by in-

dictment by a Grand Jury contrary to the 5th Amendment of the United States Constitution (R. 33). This can hardly be construed as raising the question here presented, to-wit, whether the Due Process Clause of the 14th Amendment requires a State to afford one who makes a *prima facie* showing such as petitioner's some opportunity to show his innocence. Accordingly, it is submitted that the denial of the May 9, 1949 petition in no way ruled upon or settled any of the claims here made by petitioner.

Similarly, the January 30, 1952, petition which was drawn by a lawyer, did not present any Federal questions for decision (R. 38-41). The only reference to Federal rights contained therein is the vague, passing assertion in Paragraph Seven thereof (R. 40) that petitioner is imprisoned in violation of his rights "as set out in the Constitution of the United States." Such a vague claim, asking a judge to search through that whole basic document, has been repeatedly held by this Court to be insufficient (at least when made by a party represented by counsel as petitioner was) to raise or present any Federal question. *Herndon* v. *Georgia* (1935), 295 U. S. 441, 442-3; *Harding* v. *Illinois* (1904), 196 U. S. 78, 85-88. Accordingly, it is likewise submitted that the denial of the January 30, 1952, petition in no way passed upon or barred the consideration of the claims petitioners has asserted in the petition involved in this case.

2. The Decision Below Did Not Rest upon the Defense of Former Adjudication Because Such Defense Was Not Affirmatively Pleaded as Required by Florida Law

Under the Florida Rules of Civil Procedure, as under the Federal Rules, the defense of *res judicata* must be affirmatively set forth in a responsive pleading. Rule 1.8, Florida Rules of Civil Procedure, 30 F. S. A., 1954 Supplement, p. 64, Failure to do so may result in a waiver of the defense. Thus in *Taylor* v. *Chapman* (1937), 127

Fla. 401, 173 So. 143, 144, it was held in a habeas corpus proceeding that a prior habeas corpus judgment which was not pleaded in respondent's return nor thereafter called to the Court's attention could not be relied upon as barring the action. The purpose of this rule is certainly wholesome. When dealing with such a technical and drastic defense, the petitioner should have every opportunity to be appraised of the contention that his action is absolutely and forever barred and to refute that contention with every counter-argument he can.

It follows, petitioner submits, that the Court below could not, would not, and did not base its Order upon such a defense which had not been pleaded.

3. The Defense of Former Adjudication, Being Discretionary with the Court, Was Not Relied Upon in This Case.

The Florida Supreme Court has repeatedly ruled that "the salutary principle that the doctrine of *res judicata* should not be so rigidly applied as to defeat the ends of justice" is a part of the law of Florida. *Universal Const. Co. v. City of Fort Lauderdale* (1953), Fla., 68 So. 2d 366, 369. Pursuant to this principle, the Court has stated that it "is more interested in the fair and proper administration of justice than in rigidly applying a fiction of the law designed to terminate litigation." 68 So. 2d 366, 369.

Certainly, no more fitting situation for the application of these principles could be imagined than the case at Bar where, but for their application, a man would be unconstitutionally condemned to spend his remaining days on Earth in prison (assuming, *arguendo*, that otherwise the doctrine of *res judicata* would bar this action.)

Construing the Order of the Court below, therefore, in the light of these basic principles, it is clear that the Florida Supreme Court did not deny the petition in this case

because it considered the action barred by prior rulings. (See R. 20). Indeed, the Order makes no mention of the prior adjudications nor even indicates that the Court was aware of their existence.

D. *The Order of the Florida Supreme Court Shows On Its Face the Court Considered the Petition On Its Merits.*

The Order of the Florida Supreme Court states simply (R. 20):

> "Upon consideration of the Petition for Writ of Habeas Corpus in the above cause, it appears that the Petitioner has failed to show as a condition precedent to the Writ of Habeas Corpus, probable cause to believe that he is detained in custody without lawful authority; it is ordered, therefore, that said Petition be and same is hereby denied."

This Order shows on its face that the Court considered the petition on its merits and necessarily ruled on the Federal claims asserted therein, denying their legal validity.

II. THE STATE OF FLORIDA HAS CONVICTED AND PUNISHED PETITONER THREE TIMES FOR A SINGLE OFFENSE IN VIOLATION OF HIS RIGHTS AND IMMUNITIES UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

A. *Petitioner Was Convicted and Punished Three Times for a Single Offense*

As both this Court and the Supreme Court of Florida have ruled, the undenied allegations in a petition for habeas corpus, which is dismissed without a hearing or an answer being filed, must be taken as true. *Hawk* v. *Olson* (1945), 326 U. S. 271, 273; *State ex rel. Lihtz* v. *Coleman* (1941), 149 Fla. 28, 5 So. 2d 60, 61.

In this case, the undenied allegations of the petition show that petitioner was convicted and punished three times for

a single offense committed on July 7, 1945, and was also, and on the same day, convicted and punished three times for a single offense committed on July 29, 1945.

Under Florida law it is clear and beyond dispute that the larceny of a number of cattle which are all stolen at the same time, from the same place, under the same circumstances, and with the same intent constitutes but a single offense. *Hearn* v. *State* (1951), 55 So. 2d 559, 28 A.L.R. 2d 1179. This is true regardless of whether the cattle stolen all belong to the same owner or not. *Hearn* v. *State, supra.* And specifically, this rule applies where a number of cattle are all on the same open range, and all rounded up at the same time, and loaded onto a truck at the same time from the same loading pen. *Hearn* v. *State, supra.*

In this case, petitioner was charged in a single information with stealing on July 7, 1945, a total of five cattle belonging to a Mrs. Bronson (R. 9-10). The information, however, was divided into three separate counts, one charging the theft of two steers, the second charging the theft of two cows, and the third charging the theft of one heifer. Nowhere in the information is the time of these separately charged thefts alleged with any more specificity than "on the 7th day of July, 1945". Nowhere is the place of the crime described in any more detail than "in the County and State aforesaid."

The evidence produced by the State at the trial in support of these charges showed without dispute that all five of the cattle were stolen at the same time, from the same place, under the same circumstances, and with the same intent (R. 3, 4, 16, 21).

It is submitted that under these circumstances, petitioner could lawfully have been convicted and punished for only one offense. While three offenses were properly charged, only one offense was shown by the undisputed evidence.

As stated by The Florida Supreme Court in ruling on a similar situation:

> "The difficulty does not result from the joinder of the counts in the information, but arises from the evidence." Bargesser v. State (1928), Bargesser v. State, 95 Fla. 404, 116 So. 12, 13.

In that case, a defendant had been charged by an information containing two counts with the two offenses of stealing one Ford coupe and receiving and concealing one Ford coupe, knowing it was stolen. The jury returned a general verdict of guilty as charged and the defendant was convicted of both offenses, albeit the evidence showed he had received and concealed only the same Ford coupe he had stolen. On appeal, the Florida Supreme Court held that the petitioner could not in law be guilty of both offenses and since the jury's verdict was unintelligible, the judgment was reversed.

In the case at Bar, however, the petitioner was not only convicted on all three counts, but he was sentenced to serve consecutive five year sentences on each conviction (R. 12-13).

What has been said above concerning the information charging three offenses on July 7, 1945, applies with equal force to the second information involved in this case charging three offenses of cattle stealing on July 29, 1945, from William C. Zipperer (R. 10-11). There, too, the evidence showed without dispute that the one cow and two heifers described in the three counts were all stolen at the same time, from the same place, under the same circumstances and with the same intent (R. 4, 14, 22). There, too, petitioner was convicted of three offenses and sentenced to serve three five year sentences, consecutive to each other and to the sentences imposed on the other information (13-14).

In short, petitioner was convicted and sentenced six times for two offenses.

B. *The Maximum Total Sentence Prescribed by Law for the Two Offenses Upon Which Petitioner Could Properly Have Been Convicted Is Ten Years in Prison.*

As is shown above, petitioner could have lawfully been convicted of only two offenses of cattle stealing, one for the cattle stolen on July 7, 1945, and one for the cattle stolen on July 29, 1945. Section 811.11, F. S. '53 (Section 811.11, F.S. '41) provides that the punishment for such a crime shall be "by imprisonment in the state prison not less than two nor more than five years." Appendix, p. 33.

Accordingly, it must follow that the maximum penalty which could have been imposed upon petitioner was five years' imprisonment for each offense, for a total of ten years—which term he has already more than served—unless it can be shown that he could lawfully have been punished under the terms of Section 811.12, F.S. '53 (Section 811.12, F.S. '41), which provides for a maximum penalty of twenty years imprisonment upon a second conviction of horse or cattle stealing. Appendix, p. 35.

It is submitted that since neither of the informations in this case alleged or purported to charge petitioner as a second offender, petitioner could not lawfully be punished pursuant to the terms of Section 811.12, F.S. '53 (Section 811.12, F. S. '41). While the Supreme Court of Florida has never construed Section 811.12, F.S. '53, in this situation, it has repeatedly ruled concerning other "second offender" statutes that:

> "It is the general rule that on a charge of a 'second of subsequent' offense, the question of a prior conviction is an essential element of the offense charged, and is an issue of fact to be determined by a jury.". *Spark-*

man v. *State Prison Custodian* (1944) 154 Fla. 688, 18 So. 2d, 772, 774.

See also *State* v. *Davidson* (1931), 103 Fla. 954, 139 So. 177; *State ex rel. Stoutamire* v. *Mayo* (1937), 128 Fla. 843, 175 So. So. 808, 810; *State* v. *Mayo* (1924), 88 Fla. 96, 101 So. 228, 230; *Pridgeon* v. *State* (1914), 68 Fla. 98, 66 So. 564.

Accordingly, petitioner not having been charged or convicted as a second offender can not be sentenced or punished as one. Cases cited supra. The maximum total sentence he was subject to under the law of Florida from the two offenses was ten years in prison.

C. *The Due Process Clause of the 14th Amendment Forbids a State from Punishing an Accused More Than Once for the Same Offense.*

Eighty-two years ago this Court, through Mr. Justice Miller, stated one of those rare principles which rings as true and applies as universally in this century as it did the day it was rendered:

> "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice punished for the same offense."
>
> Ex parte Lange (1874), 18 Wall. 163, 168.

The very idea of the same sovereignty, with calculated deliberation, subjecting an accused to repeated punishments for the same offense is indeed one which outrages even the very sternest sense of Justice. This feeling of basic fairness must stem far back, deep into mankind's history for even that ancient code expressed in the Old Testament of the Bible, promulgated thousands of years ago, exacted only one eye for an eye and one tooth for

a tooth. Yet the feeling flows as strongly today as ever for as recently stated by this Court just a few short years ago:

> "Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."
>
> *Louisiana* v. *Resweber* (1947), 329 U.S. 459, 462.

So inborn and widely accepted has been this feeling that happily the spectacle of double punishment has seldom come before the Bar of this Court, and usually then only in its milder, accidental or unintentional form. And in those cases, strangely enough, it has usually been the Federal Government which was involved. Indeed, petitioner knows of no case where a state of this Nation has ever urged upon this Court that it had the right, or, indeed, desired the power to punish deliberately its citizens twice or more times for the same offense. No state can conceivably have any legitimate interest in possessing such a dangerous power, suitable only for oppressive misuse.

It is highly appropriate that Justice Louis D. Brandeis, described by Chief Justice Stone as having a "passion for freedom and justice for all men," was among the first of counsel to urge upon this Court that a State may not impose a second punishment upon an accused for the same offense. *Murphy* v. *Massachusetts* (1900), 177 U.S. 155, 44 L. Ed. 711, 712. Contending that a sentence which puts a person a second time in jeopardy for the same offense deprives him of liberty without due process of law, counsel in that case argued that Massachusetts had no power to resentence according to law one who originally had been improperly sentenced and had succeeded in having that original sentence set aside on appeal. This

Court held that the mere correction of an improper sentence did not disturb fundamental principles of right, but took care to emphasize that:

> "We repeat that this is not a case in which the court undertook to impose *in invitum* a second or additional sentence for the same offense, or to substitute one sentence for another. On the contrary, plaintiff in error availed himself of his right to have the first sentence annulled so that another sentence might be rendered."

177 U.S. at p. 160.

Thereafter in *Palko* v. *Connecticut* (1937), 302 U.S. 319, a petitioner urged that a state lacked power by virtue of the 14th Amendment to place him even in double jeopardy of being punished for a single offense. In this case the specific claim was that a State could not provide for appeals by the prosecution to correct substantial legal errors in the trials of criminal cases. And again this Court held that fundamental principles of liberty and justice were not violated by such action, but likewise took care to make quite clear that:

> "What the answer would be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him we have no occasion to consider."

302 U.S. at p. 328.

While the *Palko* case involved the problem of double jeopardy or trials as distinguished from double punishment, the two are certainly not unrelated in their nature, and of the two, double punishment is clearly the more odius. As vividly stated by this Court in *Ex parte Lange* (1874), 18 Wall. 163, 173:

"For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offense? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment, a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had and, on a second conviction, a second punishment inflicted?

"The argument seems to us irresistible and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it."

Such language still vibrates with the full vigor of its obvious conviction. And following its persuasiveness, this Court has on at least two later occasions stated or ruled that the double jeopardy clause of the 5th Amendment forbids as much a second punishment as a second trial for the same offense. *United States* v. *Chouteau* (1881), 102 U.S. 603; *United States* v. *Benz* (1931), 282 U.S. 304.

On the other hand, without mention of these prior decisions or citation of any authority and, it is respectfully submitted, only by way of *dicta* (since the petitioner there had not yet served a valid, unchallenged prior sentence) this Court ruled in *Holiday* v. *Johnston* (1941), 313 U.S.

342, 349, a case arising on habeas corpus, that the erroneous imposition of two sentences for a single offense, while illegal, does not constitute double jeopardy or violate the 5th Amendment's double jeopardy clause. Since that decision, the Court has not resolved the apparent conflict where the question of double punishment under Federal authority has arisen, merely holding such punishment erroneous without reaching the Constitutional question. *Re Bradley* (1943), 318 U.S. 50; *Braverman* v. *United States* (1942), 317 U.S. 49; See *Bozza* v. *United States* (1947), 330 U.S. 160; *Helvering* v. *Mitchell* (1938), 303 U.S. 391, 399; *Rex Trailer Co.* v. *United States* (1956), — U.S. —, 100 L. Ed. (advance pp. 160, 162).

But regardless of whether double punishment be considered in violation of the 5th Amendment's double jeopardy prohibition, it is clear that this Court has struck out vigorously against such governmental action by the same sovereignty wherever it has been intentionally and deliberately imposed for a single offense, whether the ground be Constitutional, statutory, or in the exercise of this Court's supervisory power over Federal criminal procedure. *Ex Parte Lange* (1874), 18 Wall. 163, 168; *United States* v. *Chouteau* (1881), 102 U.S. 603; *United States* v. *Benz* (1931), 282 U.S. 304; *Holiday* v. *Johnson*, (1941), 313 U.S. 342; *Braverman* v. *United States* (1942), 317 U.S. 49; *Re Bradley* (1943), 318 U.S. 50.

So, also, while the question has not heretofore been squarely presented in a case involving a state, the Court has been scrupulously careful not to sanction as in conformity with Due Process under the 14th Amendment any state action bordering on intentional, separate, multiple punishments or prosecutions for a single offense. *Murphy* v. *Massachusetts* (1900), 177 U.S. 155, 160; *Palko* v. *Connecticut* (1937), 302 U.S. 319, 328.

Indeed, two recent cases, it is submitted, have indicated the very extreme limit or brink of state action in this connection. In *Louisiana* v. *Resweber* (1947), 329 U.S. 459, a sharply divided court sustained a state's power to carry out its lawfully imposed death penalty despite the accidental failure of a prior attempt (due, perhaps, to the state's negligence). Admittedly no question of an intentional, deliberate imposition of a second punishment was presented.

Similarly, in *Brock* v. *North Carolina* (1953), 344 U.S. 424, a divided court ruled that a state judge may properly be invested with a discretion, to be exercised only on substantial grounds, to declare a mistrial in a criminal proceeding over the defendant's objection and proceed again to trial of the case.

Neither decision, it is submitted can possibly be interpreted as sanctioning Florida's action in this case of deliberately, on the admitted facts, subjecting petitioner for a single offense to serve three separate prison sentences, each for the maximum term imposed by statute for the offense. Such action is so fundamentally contrary both to the spirit of the 5th Amendment's prohibition against double jeopardy and to the basic concepts of fairness and justice that it must be in violation of the Due Process Clause of the 14th Amendment to the Constitution of the United States.

D. *The Prohibition of the 8th Amendment against cruel and unusual punishments, as applied to state action by the Due Process Clause of the 14th Amendment, forbids such punishment as Florida has inflicted in this case.*

In *O'Neil* v. *Vermont* (1892), 144 U.S. 323, this Court reviewed the action of the State of Vermont in sentencing

a man to over 54 years of imprisonment upon his conviction of 307 petty offenses of selling intoxicating liquors contrary to the law of Vermont. Since the petitioner in that case, however, neglected to assign as error or argue in his brief that Vermont's action subjected him to cruel and unusual punishment in violation of the 8th Amendment, the Court stated it would forbear ruling upon the question except to note that it had previously been ruled that the 8th Amendment does not apply to the states. A significant passage from the Vermont Supreme Court's ruling on the matter was nevertheless quoted, including the following:

> "'If the penalty was unreasonably severe for a *single* offense, the constitutional question might be urged; but here the unreasonableness is only in the number of offenses which the respondent has committed.'"

144 U.S. 323, 331.

The situation posed by the Vermont Supreme Court is exactly that presented in this case. Here, a 53 year-old man with no past criminal record has been sentenced to what must be virtually a life sentence of 30 years in prison for stealing eight cattle. For the view that such a punishment for such an offense offends the 8th Amendment's inhibition against cruel and unusual punishments, as applied to State action by the 14th Amendment, petitioner respectfully commends to this Court's attention the dissent of Mr. Justice Field, concurred in by Mr. Justice Harlan and Mr. Justice Brewer, in the O'Neal case, 144 U.S. 323, 337, 362-367. See also the dissent of *Circuit Judge Thurston in United States v. Beerman* (Dist. Col. 1838), 5 Cranch CC 412, Fed. Case No. 14560.

E. *Denial of Equal Protection.*

Petitioner did not assert a denial of equal protection contrary to the Equal Protection Clause of the 14th Amendment in the Court below, and therefore that question has not been ruled upon by the Florida courts, and petitioner submits might still be asserted, if necessary, in a subsequent habeas corpus proceeding. Nevertheless, the denial of equal treatment by a State to its citizens has relevency to the reasonableness of State action under the Due Process Clause. Accordingly, petitioner submits that by imposing a different and higher punishment on him than is imposed on all others for like offenses, Florida in this case has violated the Due Process Clause of the 14th Amendment. See *Ex Parte Converse* (1891), 137 U.S. 624; *Skinner* v. *Oklahoma* (1942), 316 U.S. 535; *Dowd* v. *United States* (1951), 340 U.S. 206.

III. DUE PROCESS OF LAW COMMANDS THAT A STATE AT LEAST ESTABLISH SOME STANDARD OF PROOF, HOWEVER HIGH, AND AT LEAST PROVIDE SOME REMEDY, HOWEVER MEAGRE, WHEREBY AN INNOCENT MAN CONVICTED EXCLUSIVELY ON THE BASIS OF ADMITTEDLY PERJURED TESTIMONY CAN FREE HIMSELF FROM A TERM OF IMPRISONMENT UNJUSTLY IMPOSED

Nothing is quite so demoralizing as the spectacle of the law working an injustice, and when that injustice involves the conviction and imprisonment for 30 years of a 53 year-old man, absolutely innocent of any crime, it is difficult, to say the least, to fully understand Justice Cardozo's famous phrase that "Law *Is* Justice." It is not the realization that innocent people may wrongfully be convicted which is so shocking. Courts and juries being composed of human beings, it would be naive indeed to expect infallibility at their hands, and especially so when two depraved criminals deliberately and with calculated forethought set

out to falsely implicate an innocent man. Error in such a case, regretably, must be expected.

The shocking thing is the attitude of the Law toward one in such a predicament. All hope is denied him. There is no legal remedy. The perjurors can blatantly boast or contritely admit their revolting action in causing an innocent man to be wrongfully convicted. The Law remains deaf and decrees that the innocent convicted must serve out his "lawfully" imposed sentence.

However acceptable such a situation may be to present-day judicial palates, petitioner submits that the overwhelming majority of American laymen would be alarmed and revolted at such a concept.

What is it that petitioner seeks in this case? It is not so much. He merely asks an opportunity to show, beyond a reasonable doubt if necessary, that he was convicted solely on the basis of the false testimony of two ex-employees and co-defendants, both of whom freely and voluntarily, and without prompting by petitioner, admitted within six months after petitioner's trial that they had given untrue testimony against petitioner and that he was wholly innocent of the crimes with which they had charged him and convicted him. If petitioner can make such a showing—beyond a reasonable doubt—he asks that he be relieved from serving the remainder of his prison term. Is this too great a favor for an innocent man to ask of society in this day and age? Is this too much for Due Process of Law in the United States of America to afford a lowly convict?

Conclusion

Over 700 years ago in a meadow called Runnymede, between Windsor and Staines, a group of Englishmen received from their Sovereign a solemn promise:

> "If any one has been dispossessed or deprived by us, without the legal judgment of his peers, of his lands,

castles, liberties, or right, we will forthwith restore them to him; * * *"

Magna Charta, 25 Fla. Stat. Anno., p. 7.

This promise was made "* * * to all the freemen of our kingdom for us and for our heirs for ever * * to be had and holden by them and their heirs, of us and our heirs for ever * *"

Petitioner asks only that the full spirit of this solemn promise be kept.

Respectfully submitted,

NEAL P. RUTLEDGE,
Counsel for Petitioner.

February 20, 1956.

APPENDIX

Constitutional Provisions and Statutes Involved

Section 1, Fourteenth Amendment, Constitution of the United States, Volume 1, United States Code 1952 ed., pp. XLV-XLVI:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fifth Amendment, Constitution of the United States, Volume I, United States Code 1952 ed., p. XLIV:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Eighth Amendment, Constitution of the United States, Volume I, United States Code, 1952 ed., p. XLV:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 811.11, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953: 22 F.S.A. § 811.11:

"811.11 *Horse or cattle stealing.*—Whoever commits larceny by stealing any horse, mule, mare, filly, colt, cow, bull, ox, steer, heifer or calf, the property of another, shall be punished by imprisonment in the state prison not less than two years nor more than five years."

Section 811.12, Chapter 811, Title XLIV, Volume II, p. 2669, The Official Florida Statutes 1953: 22 F.S.A. § 811.12:

"811.12 *Second conviction of horse or cattle stealing.*—Whoever violates the provisions of § 811.11 a second time, and is convicted of such second separate offense, either at the same term or a subsequent term of court, shall be punished by imprisonment in the state prison not less than five years nor more than twenty years."

Section 954.06, Chapter 954, Title XLVI, Volume II, pp. 2851-2852, The Official Florida Statutes, 1953; 24 F.S.A. § 954.06.

"954.06 *Gain time for good conduct.*—

"(1) The commissioner of agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the board of commissioners of state institutions, or in case of those prisoners known as county prisoners, by the board of county commissioners, and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against a prisoner, viz.: Five days per month off the first and second years of the sentence; ten days per month off the third and fourth years of the sentence; fifteen days

per month off the fifth and all succeeding years of the sentence. Where no charge of misconduct is sustained against a prisoner, the deduction shall be deemed earned and the prisoners shall be entitled to credit for a month as soon as the prisoner has served such time, as, when added to the deduction allowable, will equal a month. A prisoner under two or more cumulative sentences shall be allowed commutation as if they were all one sentence.

"(2) For each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited, except that in case of escape if the prisoner voluntarily returns without expense to the state, then such forfeiture may be set aside by the board of commissioners of state institutions if in their judgment his subsequent conduct entitles him thereto. Whenever a conditional pardon granted to a prisoner by the board of pardons of the State of Florida is revoked and such prisoner ordered by said board to be returned to prison or jail, such prisoner shall be deemed to forfeit all gain time or commutation of time for good conduct, earned up to the time of his release under such conditional pardon.

"(3) Prisoners sentenced for life imprisonment who have actually served ten years and have sustained no charges of misconduct and have a good prison record, shall be recommended by the commissioner of agriculture for a reasonable commutation of sentence, and if same be granted, commuting the life sentence to a term of years, then such convict shall have the benefit of the ordinary commutation, as if originally sentenced for a term of years, unless it shall be otherwise ordered by the board of pardons."

Section 954.06, Chapter 954, Title XLVI, Volume I Official Revised Florida Statutes 1941:

"954.06 *Gain time for good conduct.*—The Commissioner of Agriculture shall keep a record of the conduct of each prisoner. Commutation of time for good conduct shall be granted by the board of commissioners of state institutions, or in case of those prisoners known as county prisoners, by the board of county commissioners, and the following deductions shall be made from the term of sentence when no charge of misconduct has been sustained against a prisoner, viz.: Five days per month off the first and second years of the sentence; ten days per month off the third and fourth years of the sentence; fifteen days per month off the fifth and all succeeding years of the sentence. A prisoner under two or more cumulative sentences shall be allowed commutation as if they were all one sentence.

"For each sustained charge of escape or attempted escape, mutinous conduct or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to that day shall be forfeited, except that in case of escape if the prisoner voluntarily returns without expense to the state, then such forfeiture may be set aside by the board of commissioners of state institutions if in their judgment his subsequent conduct entitles him thereto.

"Prisoners sentenced for life imprisonment who have actually served ten years and have sustained no charges of misconduct and have a good prison record, shall be recommended by the commissioner of agriculture for a reasonable commutation of sentence, and if same be granted, commuting life sentence to a term of years, the such convict shall have the benefit of the ordinary commutation, as if originally sentenced for

a term of years, unless it shall be otherwise ordered by the board of pardons."

Section 79.10, Chapter 79, Habeas Corpus, Title VI, Volume I, p. 334, The Official Florida Statutes 1953; 6 F.S.A. § 79.10:

"79.10 *Effect of judgment.*—The judgment so entered of record shall be conclusive until reversed in the manner hereinafter provided for, and no person remanded by such judgment while the same continues in force shall be at liberty to obtain another habeas corpus for the same cause, or by any other proceeding to bring the same matter again in question except by writ of error or by action of false imprisonment; nor shall any person who shall be discharged from confinement by such judgment be afterward confined or imprisoned for the same cause, unless by order or judgment of a court of competent jurisdiction."